Sime Securities Sdn Bhd v Tetuan Projek Kota Langkawi Sdn Bhd

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–977 OF 1997
ALAUDDIN J
29 SEPTEMBER 1999

Land Law *— Charge — Execution of — Chargor and chargee both corporations — Manner of executing charge*

Land Law *— Malay reservations — Charge in favour of non-Malay — Validity of charge — Whether prohibits creation of charges over Malay reservation land in favour of non-Malays — Whether such charged Malay reservation land may be disposed of to non-Malays — Kedah Malay Reservations Enactment No 63 ss 6(1) & 8(1)*

Land Law *— Sale of land — Order for — Application for order — Cause to the contrary, how established*

Words & Phrases *— '... sold, leased, or otherwise disposed of ...' — Kedah Malay Reservations Enactment No 63 — s 8(1) — Construction of phrase*

The plaintiff was the chargee under a charge against a piece of land. The defendant was the registered owner of the said land. The charge in favour of the plaintiff was, inter alia, a third party charge. The defendant had charged the land as security for due performance and settlement of monies due from a third party to the plaintiff arising from a share sales contract between the third party and the plaintiff. As a result of default in payment for the purchase of the shares by the third party and upon the consequent breach of the terms of the charge by the defendant, the plaintiff applied to enforce the charge by way of an order for sale of the land under s 256(3) of the National Land Code 1965 ('the NLC'). The defendant however opposed the application on a number of grounds. However, the High Court deemed fit to only deal with two issues, namely: (i) whether the charge in favour of the plaintiff contravened the Kedah Malay Reservations Enactment No 63 ('KMRE') and was therefore null and void; and (ii) whether the charge was irregular and had to be set aside because it had not been attested in accordance with the provisions of the NLC.

Held, allowing the plaintiff's application:

(1) Section 8(1) of the KMRE does not prohibit the creation of charges over Malay Reservation land in favour of a non-Malay. What is restricted is only that such land shall not be sold, leased or otherwise disposed of to a non-Malay. A 'disposal' will only arise upon a sale of the charged land upon default and by s 6(1) of the KMRE, there is sufficient safeguard that a purchaser at such a sale must be a 'Malay'. The words 'otherwise disposed of' in s 8(1) should be read ejusdem generis with the words 'sold' and 'leased'. The words 'sold' and 'leased' denotes a situation where

enjoyment of land is parted to another person and such enjoyment does not occur in a 'charge' situation. Sections 6 and 8 of the KMRE read together do not prohibit a charge over Malay reservation land. However, upon a sale of such land, the purchaser must be a Malay (see p 591A–C).

(2) The execution of any instrument of dealing by a corporation is governed by s 210(3) of the NLC and to be effected in a manner authorized by its constitution or by any law currently in force. Corporations execute documents by affixing their common seal and the affixing thereto is confirmed by members of the board of directors and/or a member of the board together with the company secretary. On the facts, this was exactly what the plaintiff had done. In any case, the defendant's director had not disclosed any facts in his affidavit to show why the execution by the affixing of the common seal of the plaintiff on the memorandum of charge or annexure was irregular and/or not in accordance with the NLC (see pp 591G, 592A–B).

(3) Cause to the contrary within s 256(3) of the NLC may be established only in the three categories of cases set out by the Court of Appeal in *Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. On the facts, the two issues raised by the defendant did not constitute cause to the contrary under s 256(3) of the NLC as they did not fall within any of the three categories of cases (see p 592C–D).

[Bahasa Malaysia summary

Plaintif merupakan pemegang gadaian di bawah gadaian terhadap suatu keping tanah. Defendan merupakan pemunya berdaftar tanah itu. Gadaian atas nama plaintif merupakan antara lain suatu gadaian pihak ketiga. Defendan telah menggadaikan tanah itu sebagai jaminan perlaksanaan yang sewajarnya dan penyelesaian wang yang perlu dibayar daripada pihak ketiga kepada plaintif yang timbul daripada kontrak jualan saham antara pihak ketiga dan plaintif.. Akibat kegagalan pembayaran untuk membeli saham-saham itu oleh pihak ketiga dan atas akibat pelanggaran terma-terma gadaian itu oleh defendan, plaintif telah memohon untuk menguatkuasakan gadaian itu melalui jualan tanah di bawah s 256(3) Kanun Tanah Negara 1965 ('KTN'). Defendan bagaimanapun membangkang permohonan itu atas beberapa alasan: (i) sama ada gadaian atas nama plaintif itu melanggar Enakmen Rizab Melayu Negeri Kedah No 63 ('ERM') dan oleh itu adalah batal dan tak sah; dan (ii) sama ada gadaian itu adalah di luar aturan dan perlu diketepikan kerana ia tidak diakusaksikan bersesuaian dengan peruntukan-peruntukan di dalam KTN.

Diputuskan, membenarkan permohonan plaintif tersebut:

(1) Seksyen 8(1) ERM tidak menghadkan pewujudan gadaian-gadaian ke atas tanah rizab Melayu atas nama seorang yang bukan

Melayu. Apa yang dihadkan hanyalah bahawa tanah itu hendaklah tidak dijual, dipajak atau sebaliknya dijual kepada seorang yang bukan Melayu. Suatu 'pelupusan' akan hanya timbul jika ada jualan ke atas tanah yang digadaikan akibat daripada ketidakpatuhan gadaian dan mengikut s 6(1) ERM terdapat perlindungan yang mencukupi bahawa pembeli di suatu jualan itu seharusnya seorang 'Melayu'. Perkataan-perkataan 'sebaliknya dijual' di dalam s 8(1) hendaklah dibaca ejusdem generis dengan perkataan-perkataan 'dijual' dan 'dipajak'. Perkataan-perkataan 'dijual' dan 'dipajak' menandakan suatu keadaan di mana hak perolehan ke atas tanah itu telah diberikan kepada orang lain dan hak itu tidak berlaku di dalam suatu keadaan 'gadaian'. Seksyen-seksyen 6 dan 8 ERM jika dibaca bersama tidak menghalang suatu gadaian ke atas tanah rizab Melayu. Walau bagaimanapun sekiranya tanah itu dijual, pembeli itu mestilah seorang Melayu (lihat ms 591A–C).

(2) Pelaksanaan apa-apa instrumen oleh suatu syarikat dikawal oleh s 210(3) KTN dan dilaksanakan dengan cara yang diberi kuasa oleh perlembagaannya atau oleh apa-apa undang-undang semasa yang yang berkuatkuasa. Syarikat-syarikat menyempurnakan dokumen-dokumen dengan mengecapkan meterai am mereka dan pelekatan itu disahkan oleh ahli-ahli lembaga pengarah dan/atau seorang ahli lembaga bersama dengan setiausaha syarikat. Berdasarkan fakta-fakta berikut, ini sememangnya apa yang plaintif telah lakukan. Di dalam apa keadaan pun, pengarah defendan tidak mendedahkan apa-apa fakta di dalam afidavit beliau bagi menunjukkan kenapa penyempurnaan dengan cara mengecapkan meterai am plaintif ke atas memorandum gadaian atau lampiran adalah di luar aturan dan/atau tidak menurut KTN (lihat ms 591G, 592A–B).

(3) Kausa yang bertentangan di dalam s 256(3) KTN mungkin boleh dibuktikan hanya di dalam tiga kategori kes-kes yang dinyatakan oleh Mahkamah Rayuan di dalam *Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. Berdasarkan fakta-fakta berikut, dua isu yang dikemukakan oleh defendan tidak membentuk kausa yang bertentangan di bawah s 256(3) KTN kerana mereka tidak termasuk di bawah mana-mana tiga kategori kes-kes itu (lihat ms 592C–D).]

Notes

For cases on charge generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1591–1784.

For cases on Malay reservations, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 2535–2374.

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3030–3101.

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
RAP Nathan v Haji Abdul Rahman bin Haji Yusof & Ors [1980] 1 MLJ 248 (refd)
T Bariam Singh v Pegawai Pentadbir Pesaka Malaysia (Administrator of the Estate of Datuk Foo Say Lee) [1983] 1 MLJ 232 (refd)

Legislation referred to

National Land Code 1965 ss 210(2), (3), 211, 256(3), 340
Kedah Malay Reservations Enactment (No 63) ss 6, 8

Anita Ibrahim (*Lee Hishammuddin*) for the palintiff.
Balvinder Singh (*Sri Ram & Co*) for the defendant.

Alauddin J: The defendant is the registered owner of the land known as HS (D) 7/93 Lot No PT 2639, Mukim Kuah, Langkawi, Negeri Kedah ('the land').

The plaintiff is the chargee under a charge against the said land bearing the following particulars:

Perserahan No	: 4110/95
Jilid No	: 653
Folio	: 1
Date of registration	: 21 May 1995

The charge in favour of the plaintiff is however a second charge registered on the said land. The charge in favour of the plaintiff is also a third party charge, ie that the defendant offered this security for the due performance and settlement of monies due from one Patrick Lim Hong Koon to the plaintiff arising from a share sales contract between the said Patrick Lim Hong Koon and the plaintiff (see exh AA–64 of encl 2). As a result of the default in the payment for the purchase of the shares by the said Patrick Lim Hong Koon and upon the consequent breach of the terms of the charge by the defendant, the plaintiff filed this application ('encl 1') against the defendant to enforce the statutory charges by way of an order for sale of the said land under s 256(3) of the National Land Code 1965 ('the NLC').

The law related to an application under s 256 of the NLC has been reviewed recently and set out lucidly in the decision of the Court of Appeal in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77.

Section 256(3) of the NLC states that the order for sale ought to be made by the court, '... unless it is satisfied of the existence of cause to the contrary.'

The Court of Appeal in the abovementioned case stated that cause to the contrary within s 256(3), may be established only in three categories of cases. The categories are:

(i) Firstly, a chargor who is able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s 340 of the NLC.

(ii) Secondly, a chargor may show cause to the contrary within s 256(3) of the NLC by demonstrating that the chargee has failed to meet the conditions precedent for making of an application for an order for sale, eg failure on the part of the chargee to prove the making of a demand or service upon the chargor of a notice in Form 16D would constitute cause to the contrary. Similarly, where the notice demands sums not lawfully due from the chargor.

(iii) Thirdly, a chargor may defeat an application for an order for sale by demonstrating that its grant would be contrary to some rule of law or equity.

The Court of Appeal further held that it is not sufficient to allege mere breaches by the chargee of the loan agreement between the chargor and the borrower, or even of the terms of the annexure to the charge in order to resist an application under s 256(3) of the NLC. An allegation that the chargee acted in breach of contract, while it may give rise to an independent action in personam, is insufficient per se to defeat the ad rem rights of a chargee under his registered charge to an order for sale.

The Court of Appeal then went on to set down a guideline in addressing a foreclosure application as follows:

> A judge hearing an application under s 256 must bear in mind that the procedure under the section is meant to be speedy and summary in nature. Therefore, the trial judge must first be concerned with whether the chargee has given the appropriate statutory notices as stipulated in the NLC. Next, he must ensure that the procedural requirements prescribed by O 83 of the Rules of the High Court 1980 have been complied with. Then, he is concerned with the very narrow question whether the material produced before him by the chargor constitutes 'cause to the contrary'.

The defendant seeks to oppose this application for an order for sale on four grounds as set out in the affidavit of its director (encl 14), namely:

(a) The charge in favour of the plaintiff is unlawful, null and void ('menyalahi undang-undang, terbatal dan tak sah') as it contravenes the Kedah Malay Reservations Enactment (No 63) ('KMRE').

(b) The charge is irregular and must be set aside because it had not been attested in accordance with the provisions of the NLC ('tidak diperakui selaras peruntukan Kanun Tanah Negara').

(c) The share sales agreement referred in the plaintiff's supporting affidavit is not annexed to the same and the said share sales agreement is likely to be illegal and consequently null and void ('kemungkinan ia menyalahi undang-undang') .

(d) There appears to be a caveat lodged against the property and the defendant is unable to confirm the interest of the caveator (Ataria Sdn Bhd).

Before considering the issues raised in opposition to this application, I would observe that the chargor has nowhere denied, contradicted or challenged:

(i) that the monies outstanding and claimed by the plaintiff are due and owing to the plaintiff; and/or

(ii) that the statutory notices, (if any) were not in order or that any condition precedent had not been satisfied.

The debtor (Patrick Lim) himself has not denied that the monies are owing. Neither has he challenged the validity of the share sales agreement.

Of the four issues raised by the defendant, I must say with respect that issues (c) and (d) do not merit any discussion as they are trivial and speculative in nature and not firmly grounded in law or on facts. In any case, the plaintiff in their affidavit in reply dated 10 April 1998 had successfully explained the two issues and it had been shown that on the facts they are without any merits at all.

I would therefore confine myself to issues (a) and (b) only.

Issue (a)

Does the charge in favour of the plaintiff contravene the Kedah Malay Reservations Enactment No 63 ('KMRE') and is therefore null and void.

Upon perusal of the provisions of the KMRE, I would agree with learned counsel for the plaintiff that there is no express prohibition against the creation of a charge over Malay reserve land in favour of non-Malays in the KMRE.

Section 6 of the KMRE reads as follows:

> Save as hereinafter provided in this Enactment where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where anywhere any reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.

I would observe that the prohibition pursuant to s 6(1) is applicable only restrictively in two respects, namely:

(i) it prohibits the vesting of any right or interest in a non-Malay which arises by reason of transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise.

(ii) the words 'or otherwise' means transactions of similar nature like 'transfer' and 'sale' where the consequence is a total devolution of interest in the property. The words 'or otherwise' should therefore be read 'ejusdem generis with 'transfer', 'sale in execution of a decree' and 'sale at the instance of a chargee'.

Section 8 of the KMRE provides thus:

> No State land included in a Malay Reservation shall be sold, leased, or otherwise disposed of to any person who is not either —
>
> a Malay, or
>
> a Siamese certified by the Director in writing to be a Siamese agriculturist permanently resident in the state.

Section 8(1) does not prohibit creation of 'charges' over Malay Reservation land in favour of a non-Malay. What is restricted by statute here is only that such land shall not '... be sold, leased or otherwise disposed of ...'. A 'disposal' will only arise upon a sale of the charged land upon default and by s 6(1) of the KMRE, there is sufficient safeguard that a purchaser at such a sale must be a 'Malay'. Again, the words 'otherwise disposed of' should be read ejusdem generis with the words — 'sold' and 'leased'. 'Sold' and 'leased' denoted situation where enjoyment of land is parted to another person. Such parting of the enjoyment of the land does not occur in a 'charge' situation.

Sections 6 and 8 of the KMRE if read together is consistent with and supports the argument of the plaintiff that a charge over a Malay reservation land in favour of a non-Malays is not prohibited under the KMRE. However upon a sale of such land, the purchaser must be a Malay.

Further, the position in Kedah, allowing creation of charges over Malay Reserve Lands even in favour of non-Malays is confirmed by the words used in Schedule A — Notice under the KMRE (issued under s 12 of the KMRE). Paragraph 3 reads:

> All documents of title except Permits, Banci Sewa, and Surat Akaun *may be charged to anyone*; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by Siamese may be sold only to a Malay or a Siamese.

Nothing can be more express and direct than these words to allow a charge over Malay reservation land in favour of a non-Malay in Kedah.

This view finds support in the cases of *T Bariam Singh v Pegawai Pentadbir Pesaka Malaysia (Administrator of the Estate of Datuk Foo Say Lee)* [1983] 1 MLJ 232 and *RAP Nathan v Haji Abdul Rahman bin Haji Yusof & Ors* [1980] 1 MLJ 248.

Issue (b)

Is the charge irregular and must be set aside because it had not been attested in accordance with the provisions of the NLC?

In this case both the chargor (defendant) and the chargee (plaintiff) are corporations. The execution of any instrument of dealing by a corporation is governed by s 210(3) of the NLC and to be effected in a manner authorized by its constitution or by any law currently in force.

This has to be distinguished from an execution by a natural person which by s 210(2) of the NLC is by either the signing or the affixing of the thumbprint of the natural person executing the instrument. The signing or affixing of the thumbprint must then be attested as required under s 211 of the NLC and the Fifth Schedule of the NLC. Where the dealings relate to a Malay reservations land, para 3(2) of the Fifth Schedule requires such attestation to be by a land administrator and this is applicable only where the execution is by a natural person. Paragraph 4 of the Fifth Schedule however excludes this requirement for the aforesaid attestation by a land administrator in cases of charge documents (where permitted) and where the execution is by a guarantee under a power of attorney on behalf of a body corporate or company.

Corporations execute documents by affixing their common seal and the affixing thereto is confirmed by members of the board of directors and/or a member of the board together with the company secretary. In this case, this is exactly what the plaintiff had done. In any case, the defendant's director has not disclosed any facts in his affidavit to show why the execution by the affixing of the common seal of the plaintiff as found on p 2 of the memorandum of charge (exh AA–64 of encl 2) or p 18 of the annexure (of the same exhibit) is irregular and/or not in accordance with the NLC.

Conclusion

On the authority of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 and having further reminded myself the manner in which a judge should approach the hearing of an application under s 256 NLC as observed by his Lordship Gopal Sri Ram in the same case, I find that the two issues raised by the defendant do not constitute cause to the contrary under s 256(3) of the NLC as they do not fall within any of the three categories of cases referred to by the Court of Appeal in *Low Lee Lian*.

Accordingly, I would make an order in terms of the plaintiff's application at encl 1. The sale by public auction is to be held on 29 December 1999 and the total amount due to the chargee at the date this order is made is RM107,966,955.55 (see encl 16). The costs of this application shall be borne by the defendant.

Plaintiff's application allowed.

Reported by Andrew Christopher Simon